
IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2005
No. 00039

ANN JACKSON, Guardian, etc.,

Appellant

v.

HOUSING OPPORTUNITIES COMMISSION, et al.,

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Hon. Michael D. Mason, Judge)

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

Appellee Housing Opportunities Commission generally accepts Ms. Jackson's statement of the case except that it omits that Montgomery County, Maryland was originally a party but filed a motion to dismiss that was granted.

QUESTIONS PRESENTED

- I. Did the circuit court correctly grant summary judgment to HOC where material facts were not in dispute and Ms. Jackson failed to establish claims for negligent retention and negligent supervision?**
- II. Did the circuit court properly find that HOC conducted a reasonable investigation and breached no duty?**
- III. Did the circuit court err in considering, but refusing to defer to, the unsupported opinion of Ms. Jackson's expert?**
- IV. Did the circuit court err in concluding that HOC had not purposely destroyed documents that were crucial to this case?**

STATEMENT OF ADDITIONAL FACTS

Melvin White began working for the Housing Opportunities Commission ("HOC") in 1990. Before hiring Mr. White, HOC conducted a background check, including a criminal history check, which did not reveal any criminal behavior. (E. 43, 257)

Until 1996, Melvin White worked as a resident custodian at Elizabeth House, a property owned and operated by HOC. (E. 45-46) Edith Brown also lived at Elizabeth House during the period that Mr. White was the resident custodian. Mr. White and Ms. Brown became friends and subsequently entered into a relationship. (E. 181) In August of 1995, Ms. Brown contacted HOC and stated that she did not want Mr. White to do any work in her apartment. Although the HOC staff asked her numerous questions about the

circumstances leading to her request, Ms. Brown did not indicate why she did not want Mr. White in her apartment. Kenneth Mares, the site manager of Elizabeth House, met with White and told him about Ms. Brown's request. Mr. Mares advised Mr. White that he should not go to Edith Brown's apartment unless he was performing maintenance work and that he should go with another maintenance worker. (E. 180)

In February 1996, Ms. Brown complained to Mr. Mares that Mr. White owed her money for purchases that she had made on a credit card and that he had failed to repay her as he promised. She also alleged that Mr. White had raped her the previous August. Mr. Mares questioned Ms. Brown about the allegations and asked why she would continue to have a relationship with Mr. White after August 1995 and then purchase items for him. Ms. Brown told Mr. Mares that she was lonely and had made some bad decisions. (E. 180)¹

Mr. Mares met with Mr. White and discussed the allegations with him. Mr. White denied raping Ms. Brown and stated that the two had a consensual relationship. Mr. Mares instructed Mr. White to stay away from Ms. Brown's apartment unless he was required to do any maintenance work and not to go into the apartment alone. Mr. Mares referred the matter to his supervisor, Mildred Greenwood, HOC Manager of Elderly Properties.

¹Initially, Ms. Brown's status as a resident was based on her mother being qualified to reside at an HOC property. Ms. Brown was permitted to reside at Elizabeth House because she was the caretaker of her mother, who was elderly and disabled. (E. 47) After Ms. Brown's mother passed away, Ms. Brown was allowed to stay at the HOC property even though she did not personally qualify. (E. 47)

HOC proceeded to investigate Ms. Brown's complaint and set up a meeting with Brown and HOC staff. Ms. Brown did not attend, but the meeting proceeded. (E. 48-49, 180-81) Ken Mares, Mildred Greenwood, Robin Miller Feller (a resident counselor of HOC) and Melvin White were present at this initial meeting. (E. 55) Management staff conducted a preliminary investigation and gave Mr. White the opportunity to answer the allegations against him.

Mr. White told HOC management that he and Ms. Brown had become involved in a friendship that developed over time into a sexual relationship. Mr. White also stated that he had given Ms. Brown keys to his apartment, which she had occasionally used. White acknowledged that sometimes he would not show up at Ms. Brown's apartment as promised and that Ms. Brown had become angry with him and cursed at him on several occasions. In December 1995, Ms. Brown had insisted on purchasing a stereo receiver for Mr. White using her credit card. After Brown complained about White in August 1995, she continued to go to Mr. White's apartment and he continued to visit her apartment as well. (E. 181)

HOC prohibits residents and staff from fraternizing with each other. (E. 60) Based on the information provided by Mr. White, HOC management staff informed him that he had violated his lease and HOC's personnel policy by having an affair with a resident. While Mr. White was an outstanding worker, HOC management staff determined that Mr. White had violated their confidence by having a relationship with Ms. Brown, and counseled him. (E. 182) Mr. White expressed sorrow and remorse for his behavior.

In accordance with HOC procedures, the case was turned over to Diane Harris, HOC's Equal Employment Opportunity Officer, for further investigation into Ms. Brown's allegations. Before Ms. Harris had an opportunity to speak with Ms. Brown, Brown visited Mr. Mares and asked him to call Harris and have her stop any action on the complaint. Ms. Brown told Mr. Mares that she did not want Mr. White to lose his job and that she would call Ms. Harris to let her know that she was lying about her allegations. Ms. Brown then told Mr. Mares that she wanted Ms. Harris to know that the reason she made the false allegations was because of her own mental problems. Ms. Brown, however, did not provide any specific information as to what her problems were. (E. 52-53, 64)

Ms. Harris subsequently met with Ms. Brown to discuss the allegations. (E. 61-62) Ms. Brown stated that she had lied about the entire matter just to get back at Mr. White because she was angry with him. She stated that her sexual relationship with Mr. White was consensual. (E. 59-60, 62-64, 182, 222-24) Although Ms. Brown stated that she had a mental illness, the HOC staff felt that Brown was an intelligent and competent person, which was evident by the fact that she was the caretaker for her elderly and disabled mother. (E. 56-57) The HOC staff had no information that would lead them to believe that Brown was lying about why she recanted the allegations against Mr. White. (E. 78-79)

Based on the meeting with Brown and other information gathered, HOC staff recommended to the Director of Human Resources, Annie Alston, not to terminate Mr. White. (E. 73-74) While White's consensual relationship with a resident was a serious violation of HOC policy, the HOC staff, in making a determination of what course of action

to take, considered all of the information, including Mr. White's background, the lack of any resident complaints or problems, the recanting by Ms. Brown, and Mr. White's work performance. Ms. Greenwood recommended that Mr. White be transferred from Elizabeth House to Holly Hall, another HOC-owned property, to avoid any further interaction between him and Ms. Brown. She chose Holly Hall because the complex was an open community and had a strict property manager. (E. 67-69, 80-83) Ms. Greenwood informed the resident manager at Holly Hall of the circumstances surrounding the transfer. (E. 70-71) When Ms. Brown learned of the transfer, she became upset because she wanted Mr. White to remain at Elizabeth House. (E. 67)

Mr. White worked at Holly Hall until his resignation in July of 2002, after the allegations concerning Joy Jackson arose. At Holly Hall, Mr. White continued his duties as a custodian and lived in an apartment at the complex. In the six years that White was at Holly Hall, HOC never received any complaints from any residents about him. (E. 182)

In February 1996, Ann Jackson and her daughter, Joy, moved to Holly Hall from another HOC property. (E. 29) Ms. Jackson met Mr. White shortly after arriving at Holly Hall and they became close friends. Ms. Jackson invited Mr. White into her apartment where they would watch movies and play with Joy. (E. 102-03) Their relationship progressed from a close friendship to a consensual sexual relationship. (E. 29-30, 104) The sexual relationship between Jackson and White only lasted a short time, but they remained good friends. (E. 108-09) Ms. Jackson was aware of Edith Brown and had even asked Mr. White about her allegations. Mr. White explained to Ms. Jackson what had happened, and Ms.

Jackson apparently was satisfied with Mr. White's explanation and never questioned him further. (E. 120-24)

In September 1998, Ms. Jackson moved to an HOC apartment in Gaithersburg and remained on friendly terms with Mr. White, keeping in contact by telephone. (E. 94-95, 108-09) In approximately December 2000, Ms. Jackson invited Mr. White to her home to help with her Christmas tree. (E. 110-11) Subsequently, on several occasions when he was not working, Mr. White visited Ms. Jackson and helped her with chores. The friendship again developed into a sexual relationship. (E. 111-12) From early 2001 until May 2002, Mr. White visited Ms. Jackson and Joy on several occasions. (E. 113-14)

Sometime after May 2002, Joy told her mother that Mr. White had inappropriately touched her. Ms. Jackson contacted the Crisis Center and then reported the matter to the police. (E. 115-19) White was arrested and pleaded guilty to child abuse and third degree sexual assault charges. He was sentenced to 10 years in jail on each count, with all but nine months suspended, to be served concurrently. Upon his release, White was placed on five years supervised probation. (E. 125-28)

ARGUMENT

In reviewing a grant of summary judgment, the proper standard is whether the trial court's decision was legally correct. *Converge Servs. Group, LLC v. Curran*, 383 Md. 462, 476, 860 A.2d 871, 879 (2004). Under Maryland Rule 2-501(e), summary judgment is appropriate when the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Bradley v. Fisher*, 113 Md. App. 603, 610, 688 A.2d 527, 530 (1997).

I. The circuit court correctly granted summary judgment to HOC where material facts were not in dispute and Ms. Jackson failed to establish claims for negligent retention and negligent supervision.

Ms. Jackson asserts that there were material facts in dispute and that the circuit court did not properly consider inferences in the light most favorable to her. But the court did consider the inferences to be drawn from the facts and what Ms. Jackson contends are inferences are in reality arguments unsupported by the undisputed facts in this case. Specifically, there are two main bases for Ms. Jackson's contentions: 1) the contradictory affidavit of Edith Brown; and 2) the affidavit of a terminated employee. None of the facts alleged in either affidavit, however, are material to the issues in this case and any inferences to be drawn from those facts were not sufficient to preclude summary judgment in this case.

Ms. Jackson relies on the affidavit of Edith Brown, which was submitted nine years after the alleged rape occurred, to create inferences that the rape actually occurred and that the HOC did nothing about it. But the inferences that Ms. Jackson alleges she is entitled to are in actuality facts that were not presented to HOC at the time it investigated Brown's

complaint. Ms. Jackson wanted the circuit court to make factual findings about an alleged incident that occurred nine years before when the evidence presented to HOC was not the same as what was presented to the court in the Brown affidavit. The circuit court correctly refused to find material disputes based on alleged facts that were not available to the HOC until 2005.

In February 1996 Edith Brown went to the resident manager of Elizabeth House and claimed that Mr. White owed her money and also that he raped her. When HOC investigator Diane Harris investigated the allegations, however, Ms. Brown recanted, saying that sexual contact with White was consensual and that she had made the false accusation because she was angry with him. Brown also claimed that she had mental problems. (E. 48-53, 59-64, 182) In 2005 — nine years later — Ms. Brown alleged in an affidavit that she really was raped by Mr. White and that her recanting was false. She never presented that information to HOC.

It is undisputed that HOC conducted a thorough investigation of the rape allegations. Ms. Harris was an investigator with over twenty-three years of experience involving allegations of conduct between employees and residents, discrimination, harassment, and assaultive-like behavior, and had a wealth of experience in evaluating witnesses. (E. 217-21, 228, 230) Ms. Harris met with Ms. Brown for approximately two hours about the allegations. As she had done with Mr. Mares, Brown recanted the allegations when speaking with Harris. (E. 222-24) Ms. Harris felt that Ms. Brown was comfortable during the meeting and did not appear to be afraid. (E. 223-24, 227) Mildred Greenwood, HOC Manager of

Elderly Properties, was also present at the meeting and confirmed that Ms. Brown did not give any indication that her recanting was false. (E. 59-65) Ms. Harris asked Ms. Brown to put in writing her recanting of the allegations just to be sure, and Ms. Brown did so without hesitation. (E. 225-26) Furthermore, Ms. Brown indicated that she did not contact the police, which was consistent with the fact that no one at HOC was aware of any police investigation. (E. 231) Based on all this information, Ms. Harris believed the recanting was genuine, and there was no evidence presented at that time to make her or anyone else believe otherwise. (E. 231-32) The circuit court, therefore, did not err in not drawing inferences from Brown's contradictory affidavit.

The second affidavit was written by a woman who was terminated by HOC, Elise Bryant-Coles, who claimed that in 2001 she was contacted by a resident of Holly Hall who complained that Mr. White had climbed a tree and was looking into her apartment. Ms. Bryant-Coles alleged that she met with several people concerning the allegations as well as members of the resident's family and that she then reported the incident to Mildred Greenwood. But whether Mr. White was a peeping Tom is not relevant to whether HOC was negligent in conducting the investigation into the Brown allegations.

Moreover, Ms. Bryant-Cole's affidavit did not explain the entire situation that occurred surrounding the resident's complaint. According to an affidavit submitted by Ursula Brinkley, a resident counselor at Holly Hall, in February of 2002 — not April 2001 — Hilda Jordan reported that money was missing from her apartment. Ms. Brinkley

immediately took Ms. Jordan to Ms. Bryant-Coles' office to discuss the matter. (Apx. 1-2)² At that time, Ms. Jordan also indicated that she saw someone in a tree looking into her apartment. However, she never indicated that she knew who it was. (Apx. 2) Ms. Bryant-Coles directed Ms. Jordan to call the police, which she did. (Apx. 2) In the meantime, a conference was called with Ms. Jordan, Ms. Jordan's two daughters, Ms. Bryant-Coles and Ms. Brinkley. At that time, they discussed the stolen money and Ms. Jordan's claim that she saw someone in a tree near her apartment. At no time, however, did Ms. Jordan identify the person who she saw in the tree — she never implicated Melvin White as the person who was in the tree. (Apx. 2) Additionally, Ms. Bryant-Coles failed to mention in her affidavit that the police were called, responded to Holly Hall, and were unable to find any wrongdoing by anyone, including Mr. White. (Apx. 2)

Ms. Jackson also points to Ms. Bryant-Coles' lack of knowledge of the rape allegations made by Brown. But Bryant-Coles' knowledge of the allegations is irrelevant because she became White's supervisor years after the allegations were made. Further, contrary to Ms. Jackson's assertion that certain inferences should be drawn from this alleged lack of knowledge, Mildred Greenwood notified White's supervisor at the time at Holly Hall of the allegations. (E. 70-71) Moreover, it is a leap to say that had Bryant-Coles known of the allegations, she would have supervised White's activities and he would not have molested Joy. Ms. Jackson overlooks the fact that White did not molest Joy at Holly Hall — it was

²Ms. Brinkley's affidavit was attached to HOC's summary judgment reply memorandum but was inadvertently omitted from the record extract.

a different apartment complex that Ms. Jackson had moved to. (E. 28-29) Moreover, although Ms. Jackson knew of Brown’s allegations, she continued to invite White to her home. Accordingly, the circuit court did not err in not drawing the inferences from the Bryant-Coles affidavit that Ms. Jackson suggests.

Ms. Jackson relies on *Okwa v. Harper*, 360 Md. 161, 757 A.2d 118 (2000), which has no application here. In that case the plaintiff alleged that in the course of an arrest police officers had violated his federal and state constitutional rights and committed various torts. The Court of Appeals found that the plaintiff’s and officers’ versions of facts were “diametrically opposed” and the trial court gave credence to the officers’ version of facts in granting summary judgment. In *Okwa* there was clearly a dispute as to knowledge, intent and motive, which is not present here. In contrast, in this case there is no dispute as to what information HOC knew about White concerning the Brown allegations. Ms. Jackson continues to insist, however, that HOC should not have believed the information given by Brown when she recanted. Unlike the court in *Okwa*, however, the circuit court in this case was not forced to choose between a conflicting set of facts — here the facts were undisputed, although not accepted by Ms. Jackson. Accordingly, the circuit court did not err in granting summary judgment to HOC.

II. The circuit court properly found that HOC conducted a reasonable investigation and breached no duty.

To establish a cause of action in negligence, a plaintiff must prove the existence of the duty owed by a defendant to her, a breach of that duty, a causal relationship between the breach of the duty and the harm claimed, and damages. *Muthukumarana v. Montgomery County*, 370 Md. 447, 510, 805 A.2d 372, 410 (2002).

To establish a claim for negligent retention or supervision, a plaintiff must establish: (1) the existence of the employment relationship; (2) the employee was incompetent or otherwise unfit for the job and that this incompetence or lack of fitness for the job posed an unreasonable threat to those members of the public as would foreseeably come into contact with the employee, although the exact harm or victim may not be foreseeable; (3) the employee's actual or constructive knowledge of such incompetence or lack of fitness for the job; (4) the employee's act or omission causing plaintiff's injuries; and (5) the employer's negligence in retaining or supervising the employee being the proximate cause of the plaintiff's injuries. *See Henley v. Prince George's County*, 60 Md. App. 24, 479 A.2d 1375 (1985), *aff'd* in part and *rev'd* in part, 305 Md. 320, 503 A.2d 1333 (1986).

An employer has a duty not to retain anyone who poses an unreasonable risk to other persons who would come into contact with that employee because of the employment relationship. An employer who breaches this duty is responsible for any foreseeable injuries or damages caused by the conduct or actions of such employee. *See Henley v. Prince George's County*, 305 Md. 320, 336, 503 A.2d 1333, 1341 (1986).

The circuit court in this case found that the HOC had not breached its duty. Although *Cramer v. Housing Opportunities Comm'n*, 304 Md. 705, 501 A.2d 35 (1985), reaffirmed the responsibility of employers whose employees come into contact with the public, the facts in this case are very different.

In *Cramer*, the plaintiff sued HOC for the negligent hiring of a housing code inspector who sexually assaulted her in a townhouse that she rented from HOC. The plaintiff claimed that HOC was negligent in hiring the housing inspector for such a sensitive position without having any basis to believe he was trustworthy and without having made any reasonable inquiry to ascertain his fitness for that position. As part of her proof, the plaintiff offered evidence that the housing inspector previously had been convicted of robbery and assault and burglary. She also established that at the time of his hiring, the housing inspector was under indictment in Montgomery County for rape and other related offenses. Two months after he was hired by HOC, the housing inspector assaulted the plaintiff. During the trial, the court excluded evidence concerning the housing inspector's record of criminal convictions and the accessibility of that information to HOC. At the conclusion of the trial, the court entered judgment in favor of HOC with a finding that there was insufficient legal evidence to establish a causal relationship between any negligence by HOC and the attack on the plaintiff.

On appeal, the Court of Appeals reversed, concluding that the lower court erred in excluding the evidence of the criminal convictions of the housing inspector. The court noted that since HOC had accepted an incomplete application for employment by the housing

inspector and failed to undertake “even the most rudimentary investigation either to verify the sparse information furnished or to otherwise gather independent information concerning the fitness of the employee,” there was some evidence that could be presented to a jury to determine if HOC had breached its duty. *Id.* 304 Md. at 711-12, 501 A.2d at 38.

The Court went on to note, however, that the plaintiff must prove that the failure of HOC to undertake a **reasonable** inquiry resulted in the hiring of the housing inspector. *Id.* 304 Md. at 713, 501 A.2d at 39. The Court further stated that once negligent hiring is shown, the plaintiff must still prove that the hiring was the proximate cause of the injury. *Id.* The Court indicated that if the housing inspector had been negligently hired, but had assaulted a tenant of HOC previously unknown to him in a nearby shopping center and during off-duty hours, there would be no causal relationship between the hiring and the assault.

Recently, the Court of Appeals in *Horridge v. St. Mary's County Department of Social Services*, 382 Md. 170, 181-82, 854 A.2d 1232, 1238 (2004), further recognized that in negligent selection, training and retention cases, not only must a plaintiff establish that the employee was incompetent or unfit for his or her particular job but that the public agency should have been aware of the incompetence or unfitness of the employee. Here, Ms. Jackson was not able to satisfy her burden and summary judgment was properly entered on behalf of HOC.

There was no breach of duty.

HOC did not breach any duty owed to Joy by retaining and supervising Mr. White after the incident involving Edith Brown. In determining HOC's duty in this case, the circuit

court considered the duty of a landlord or management company to protect apartment tenants, since the relationship between HOC and Joy is one of landlord and tenant. In Maryland, if a landlord has knowledge of or should have knowledge of criminal activity or improper conduct against persons on its property, the landlord has a duty to take reasonable measures in view of the existing circumstances to eliminate foreseeable harm. *Univ. of Md. Eastern Shore v. Rhaney*, 159 Md. App. 44, 57, 858 A.2d 497, 504 (2004).

As in any negligence case, a key element in a negligent retention or supervision case, is foreseeability of the harm. “‘Foreseeability’ means that a person of ordinary intelligence should have anticipated the dangers that his negligence created.” *Univ. of Md. Eastern Shore v. Rhaney, supra*, 159 Md. App. at 57, 858 A.2d at 504, quoting *Gutierrez v. Excel Corp.*, 106 F.3d 683, 687 (5th Cir. 1997).

In *Univ. of Md. Eastern Shore*, this Court reversed a jury verdict against the University on a claim involving a student who was assaulted by his roommate. The roommate previously had been suspended following a series of fights after a party the year before, but this information was not disclosed to the plaintiff. The student argued that the University had a duty not to put him in harm’s way. But while the roommate had been suspended for fighting on two occasions, neither fight occurred in a dormitory setting, involved the use of weapons, or resulted in any criminal charges. Additionally, there was no evidence that the roommate had ever assaulted or threatened to assault any of his roommates. This Court, analogizing the case to the duty owed by a landlord to a tenant, concluded that there was insufficient evidence to establish that the roommate had the “propensity” to assault

others. *Id.* 159 Md. App. at 58, 858 A.2d at 505. This Court went on to note that the fact that the roommate had been involved in fighting and had been suspended for it did not establish the foreseeability that the roommate would assault a fellow roommate. Thus, this Court concluded there was no breach of any duty to the student. *Id.* at 60, 858 A.2d at 506.

In the instant case, Ms. Jackson claimed that since Mr. White had a sexual relationship with an HOC resident who claimed to have a mental problem and Mr. White was prohibited from having such a relationship with a resident, HOC should have been aware that Mr. White was the type of person who would prey on vulnerable people and take advantage of them to the point of having sex with them. Ms. Jackson also claimed that because Ms. Brown made allegations of rape and then recanted with the statement that she was lying because she had mental problems, HOC should have had some heightened duty and done more in its investigation.

But while HOC was required to look into the matter raised by Ms. Brown, it was not required by any known standard to act as a law enforcement official in investigating a crime or as a mental health professional in assessing the psychiatric or psychological condition of one of its employees under the circumstances of this case. Instead, it was required to act reasonably. As discussed above, HOC conducted a reasonable inquiry as required by the Court in *Cramer*. HOC held several meetings in which its staff persons met with Mr. White to investigate Ms. Brown's allegations of rape, which she retracted. Moreover, the matter was referred to the EEO officer and she met with Ms. Brown and again with Mr. White. Based on the admissions of both Ms. Brown and Mr. White, HOC concluded that there was

a consensual sexual relationship between the two. There was nothing presented to HOC that reasonably could show that Ms. Brown was lying about her retraction. Ms. Brown had not filed any criminal action against Mr. White, who was never arrested or charged with any criminal activity relating to Brown.

Unlike the housing inspector in *Cramer*, Mr. White had nothing in his background and had no pending indictments that would have led HOC to believe that he might be a danger to the residents. Moreover, even if Ms. Brown had some self-described mental issues, there is nothing in the evidence to suggest that Ms. Brown was incompetent or presented herself in such a way that any mental issues she may have had should have alerted HOC that Melvin White was engaged in preying on vulnerable people.

HOC took reasonable action based on all the circumstances and transferred Mr. White to another facility that was smaller and more open than the prior property, that was under the supervision of a strict property manager, and that precluded any contact between White and Brown. Once White was transferred, no residents at the new building complained about him for the entire time that he was there. (E. 182)

Ms. Jackson clearly did not establish foreseeability. In line with the Court's reasoning in *Univ. of Md. Eastern Shore*, the fact that Mr. White had an inappropriate relationship with Ms. Brown and had been counseled for knowingly fraternizing with a resident in violation of HOC rules does not establish the foreseeability that Mr. White would seek out another resident, accept her invitations to her home, and then molest her child. Further, there is no evidence that HOC knew of White's relationship with Ms. Jackson.

Moreover, the fact that Mr. White was not supposed to be engaging in a sexual relationship with Ms. Jackson does not establish that he was a danger to residents. There is no credible evidence in this case that Mr. White was engaged in any inappropriate relationship with Joy at Holly Hall. Significantly, the conduct Jackson complains about did not occur where White worked, but at another HOC facility where Jackson lived and invited White to visit. (E. 28-29) Ms. Jackson was not aware of any problems at Holly Hall and there is no evidence that anyone ever reported any problems to the manager at Holly Hall to suggest that Mr. White was preying on Ms. Jackson and the child. (E. 182) The only evidence in this case concerning Mr. White's assaultive behavior relates to his actions at Ms. Jackson's apartment in Gaithersburg, a building in which White neither worked nor resided.

Housing management staff of ordinary intelligence should not have been aware of any harm that might result from them transferring Mr. White as opposed to firing him. The circuit court properly rejected the imposition of such expert mental health knowledge on HOC staff, especially where sexual offender experts have difficulty in assessing the propensities of people to commit sexual offenses. (E. 153)

Given the elements of negligence with regard to retaining and supervising employees as well as the duty of HOC to provide reasonably safe premises for its tenants, there was no evidence in this case upon which a reasonable juror could conclude that HOC knew or should have known that Melvin White, as a result of his consensual but inappropriate relationship with Edith Brown, was a danger to residents such that he would have later attacked a child. Further, there was insufficient evidence to establish any breach of any duty

or that Mr. White's actions were foreseeable. The circuit court, therefore, properly granted summary judgment to HOC.

III. The circuit court did not err in considering, but refusing to defer to, the unsupported opinion of Ms. Jackson's expert.

The circuit court did not err in ruling that Ms. Jackson's expert's personal opinion did not set a standard for what HOC must do. While Ms. Jackson prefers to frame the issue solely of whether White, whom she calls a sexual predator, posed a danger to residents, the real issue was under what circumstances a landlord owes a duty of care to its residents.

Ms. Jackson cannot rely on the alleged rape of Ms. Brown to establish whether HOC's actions were reasonable because Brown recanted the allegations. Moreover, Brown continued a relationship with White after the alleged rape and complained when White was transferred to another complex, behavior which is inconsistent with that of a rape victim.

Ms. Jackson attempts to mislead the Court by focusing on non-factual hypothetical questions presented to experts in this case to show a dispute of fact. She claims that when HOC's expert, Michael Spodak, M.D., was given a hypothetical question during his deposition about the rape allegations, he altered his opinion about notice to HOC. Of course, Dr. Spodak stated that if, in fact, Melvin White had been a violent rapist and HOC knew it, then that information would have put HOC on notice that Mr. White had the potential for being a violent rapist to others. However, the hypothetical did not present the facts known to HOC at the time.

Ms. Jackson also asserts that when HOC's sexual offender expert, Dwight Colley, was asked to assume that Edith Brown had been raped, Dr. Colley noted that if that fact were true, someone needed to "take a look" at Melvin White. However, once again, the facts presented to Dr. Colley were not the facts known to HOC at the time it made the decision to transfer Mr. White from Elizabeth House to Holly Hall.³

HOC does not dispute that if it knew or had significant evidence to believe that Melvin White had raped Edith Brown at the time that the matter was brought to HOC's attention, it would have handled the matter differently. Annie Alston indicated that if she had thought that Melvin White had really raped Edith Brown, she would have fired him. (E. 82) But the focus of the inquiry in this case is what was known to HOC at the time it took action, not what information was known almost ten years later. Accordingly, expert testimony concerning sexual predators was not relevant to the issues presented in this case.

Moreover, Ms. Jackson misunderstands the circuit court's ruling. The court did not require that Ms. Jackson have an expert to determine the standard of care in this case. The court simply noted that Ms. Jackson's expert was not experienced in the area in issue and that the case law also did not support Ms. Jackson's theory of breach of duty:

[T]here is no expert that has been offered that pretends to have any expertise with respect to what are the duties of the management company in managing an apartment building. At best, your expert opined that in his personal opinion given his knowledge of human

³Ms. Jackson makes much of Dr. Colley's deposition testimony that an evaluation of White would have cost only \$1,200.00. She ignores the fact, however, that such an evaluation had not been recommended at the time. And based on the information known by HOC, it had no reason to order such an evaluation.

nature and as well that his expert opinion, HOC is not a group of medical doctors, that he would have done additional things but that doesn't set the standard for what HOC must do. There is no reference anywhere in any of this anywhere in the case that I've been directed to that there is any deviation of any kind of recognized practice or standard within the industry or that any competent expert has offered any opinion that they deviated from some duty that they are held to.

(E. 284-85)

Accordingly, the circuit court did not err in finding that there was no evidence, through expert testimony or otherwise, that HOC had breached a duty of care.

IV. The circuit court did not err in concluding that HOC had not purposely destroyed documents that were crucial to this case.

While an inference may arise from the suppression or destruction of evidence by a party to a case that such evidence would be unfavorable to that party's case, that inference does not take the place of substantive proof of a fact necessary for the other party's case. *See Larsen v. Romeo*, 254 Md. 220, 228-29, 255 A.2d 387, 391 (1969) (discarding of part of brake system did not negate the defendant driver's testimony that his brakes suddenly failed).

Based on the various depositions, it appears that the missing file may have contained the written recantation by Edith Brown and some notes of Diane Harris, which she took during the investigation. In addition, Annie Alston testified that she also thought there may have been a memorandum that she would have prepared concerning Mr. White's transfer. These three documents were hardly the majority of documents in this case. Moreover, there was no dispute that Edith Brown recanted her rape allegations and put her retraction of the allegations in a written document. And there was no dispute that Ms. Harris prepared notes.

(E. 223) Finally, there was no dispute that HOC transferred Mr. White from Elizabeth House to Holly Hall as a result of the relationship he had with Ms. Brown, which was a consensual, sexual relationship that was prohibited between residents and staff.

The lack of the documents regarding Brown had no material bearing on the present case. The circuit court, therefore, correctly determined that sanctions were not appropriate in this case because the documents that Ms. Jackson alleged had been destroyed did not relate to facts or circumstances that were contested between the parties. The court noted that “in this instance, all of the participants to the event on both sides seem to agree as to what occurred insofar as the underlying facts relating to Ms. Brown’s report. There is no dispute but that she did, in fact, it’s not like she’s saying I never recanted.” (E. 243-44) Accordingly, the decision of the circuit court should be affirmed.

CONCLUSION

The circuit court correctly granted summary judgment in this case because HOC conducted a reasonable investigation and did not breach a duty to Joy Jackson. Therefore, a necessary element to the claims of negligent supervision and retention was not satisfied. This Court should affirm the circuit court’s decision.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

APPENDIX

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Affidavit of Ursula J. Brinkley Apx. 1